UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant JOHN L. APELDOORN
United States Army, Appellant

ARMY 20120965

Headquarters, United States Army Alaska
Stefan R. Wolfe, Military Judge
Colonel Tyler J. Harder, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Timothy Kotsis, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major Steven J. Collins, JA; Captain Benjamin W. Hogan, JA (on brief).

23 April 2015

SUMMARY DISPOSITION

Per Curiam:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of wrongful sexual contact, two specifications of assault consummated by battery, and one specification of indecent language in violation of Articles 120, 128, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 920, 928, 934 (2006 & Supp. IV 2011). The panel sentenced appellant to a bad conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.[*]

[*] Prior to action, the convening authority deferred appellant's automatic and adjudged forfeitures until action.

Appellant's case is before the court for review pursuant to Article 66, UCMJ. Appellant assigns three errors, one of which merits discussion as it relates to a post-trial order issued *sua sponte* by the military judge. We also considered those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they are without merit.

Appellant was convicted of, *inter alia*, the following charges and specifications:

> CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120.
>
> SPECIFICATION 1: In that [appellant], did, at or near Fort Wainwright, Alaska, on or about 3 April 2011, engage in a sexual contact, to wit: intentionally touching the buttocks and inner thigh of Ms. [EL], and such sexual contact was without legal justification or lawful authorization and without the permission of Ms. [EL].
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> SPECIFICATION 2: In that [appellant], did, at or near Fort Wainwright, Alaska, between on or about 22 September 2011 and on or about 23 September 2011, wrongfully engage in sexual contact, to wit: intentionally touching the breast of Ms. [SP], and such sexual contact was without legal justification or lawful authorization and without the permission of Ms. [SP].
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> CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 128.
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> SPECIFICATION 1: In that [appellant], did, at or near Fort Wainwright, Alaska, on or about 3 April 2011, unlawfully grab Ms. [EL] around the waist with his hands.
>
> SPECIFICATION 2: In that [appellant], did, at or near Fort Wainwright, Alaska, between on or about 22 September 2011 and on or about 23 September 2011, unlawfully touch Ms. [SP] on the breast with his hand.

During trial, what started as a pretrial motion alleging Specification 2 of Charge II was either an unreasonable multiplication of charges or multiplicious with Specification 2 of Charge I, evolved into a motion for dismissal of both specifications of Charge II for findings and sentencing. The government acknowledged charging the Article 128 specifications in the alternative to the corresponding Article 120 specifications for the same conduct in Charge I, and conceded the specifications in Charge II were unreasonably multiplied for

sentencing. After the panel returned findings of guilty to all specifications, the appellant renewed the motion, expanding it to dismiss both Article 128 specifications of Charge II on unreasonable multiplication of charges grounds for findings and sentencing. The military judge denied the motion as to findings, but he instructed the panel to treat each corresponding wrongful sexual contact and assault as one offense for purposes of sentencing.

While reviewing the record of trial for authentication, the military judge reconsidered his ruling regarding the unreasonable multiplication of charges for findings and found the accused was entitled to relief, ordering the merger of Specification 1 of Charge I with Specification 1 of Charge II, and the merger of Specification 2 of Charge I with Specification 2 of Charge II. The post-trial order, however, did not dismiss the Article 128 specifications in Charge II.

Appellant now argues the failure of the military judge to dismiss Charge II and its specifications as an unreasonable multiplication of charges for findings resulted in prejudice during sentencing. Considering the sentencing instructions effectively prevented appellant from being unreasonably subjected to an increase in punishment, we disagree that appellant was prejudiced at sentencing. *See United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012); *United States v. Quiroz*, 55 M.J. 335 (CA.A.F. 2001). Nonetheless, we find dismissal of Charge II and its specifications is appropriate to effectuate the military judge's post-trial order.

The government may properly advance in its charging decision alternative theories of criminal liability in response to a single act. *See United States v. Jones*, 68 M.J. 465, 472-73 (C.A.A.F. 2010) ("[T]he government is always free to plead in the alternative."). When an appellant is convicted of two specifications charged in the alternative for exigencies of proof, however, both convictions cannot stand. *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014) ("Dismissal of specifications charged for exigencies of proof is particularly appropriate given the nuances and complexity of Article 120, UCMJ, which make charging in the alternative an unexceptional and often prudent decision").

CONCLUSION

Upon consideration of the entire record, the findings of guilty of Charge II and its specifications are set aside, and Charge II and its specifications are dismissed. The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the matters noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the panel would have adjudged the same sentence. The sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court